Supreme Court, U.S.
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No. 95-1012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOE L. CALDWELL,

Petitioner,

v.

THE AMERICAN BASKETBALL ASSOCIATION, INC.; THE SPIRITS OF ST. LOUIS BASKETBALL CLUB, a limited partnership; OZZIE SILNA; DANIEL SILNA; HARRY WELTMAN; DONALD SCHUPAK; and TEDD MUNCHAK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

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January 5, 1996

14pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	7
I. THE QUESTION RAISED IN THE PETITION IS NOT PRESENTED BY THIS RECORD	7
II. THE QUESTION PRESENTED IN THE PETITION IS NOT IMPORTANT; IT IS NOT RAISED IN ANY OTHER CASE	9
III. THE PETITION SHOULD NOT BE CONSIDERED IN CONJUNCTION WITH OTHER CASES ON THE COURT'S DOCKET	9
IV. NO CONFLICT AMONG THE CIRCUITS WARRANTS REVIEW OF THIS CASE	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
American Basketball Ass'n Players' Ass'n v. National Basketball Ass'n, 72 F.R.D. 594 (S.D.N.Y. 1976)	8
American Basketball Ass'n Players' Ass'n, 215 N.L.R.B. 280 (N.L.R.B. 1974)	6, 8
Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983)	9
Brown v. Pro Football, Inc., 311 U.S. App. D.C. 89, 50 F.3d 1041 (1995), *cert. granted*, 64 U.S.L.W. 3414 (U.S. Dec. 8, 1995) (No. 95-388)	9-10
FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)	4, 5
National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed* (U.S. July 24, 1995) (No. 95-137)	10
Statutes	
15 U.S.C. § 1	1
15 U.S.C. § 15(a)	1-2
29 U.S.C. § 157	2
29 U.S.C. § 158(a)(1), (3)	2

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STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

STATEMENT OF THE CASE

The relevant facts and procedural history of this case are set forth in the opinion of District Judge Leonard B. Sand, 825 F. Supp. 558, 560-64, 566-74, Pet. 16a, 18a-27a, 32a-48a. Judge Sand stated these facts in the light most favorable to petitioner

Joe L. Caldwell ("Caldwell"). After discovery, Judge Sand found that Caldwell could raise no genuine issue of material fact that warranted a trial on Caldwell's claim that the defendants' concerted action, an alleged boycott, denied Caldwell employment as a professional basketball player after his team, respondent The Spirits of St. Louis Basketball Club ("The Spirits"), unilaterally suspended Caldwell on December 3, 1974. On that basis, the District Court rendered summary judgment dismissing Caldwell's complaint. The Second Circuit did not disturb any of the District Court's findings. *See* 66 F.3d 523, 525-26, Pet. 1a, 3a-5a.

At the time of the events in late 1974 that precipitated this action, Caldwell was playing his 11th year of professional basketball. He was playing out the last year of a 5-year exclusive contract with The Spirits, a team in the American Basketball Association ("ABA"). Caldwell's contract was due to expire October 29, 1975. Caldwell was president of the players' union, the American Basketball Association Players' Association. *See* 825 F. Supp. at 560-64, Pet. 18a-27a.

On December 3, 1974, The Spirits suspended Caldwell for breach of his duties of loyalty and fidelity to his employer. The Spirits had gathered evidence indicating to its management that Caldwell had assisted The Spirits' star player, Marvin Barnes ("Barnes"), to "jump" the team on the eve of a game with the New York Nets as a tactic in Barnes' effort to renegotiate the terms of his employment contract. After accompanying Barnes to the airport, Caldwell indisputably then lied when he responded to management's questions about the missing Barnes, denying "any knowledge of Barnes' whereabouts." 825 F. Supp. at 562, Pet. 22a-23a; 66 F.3d at 525-26, Pet. 3a-4a.

The petition's statement of the case contains several assertions of so-called fact that are central to the question that the petition would present for review, but that are without any support in the record and are contrary to the facts as determined by one or both courts below. First, reiterating Caldwell's argument below that the way the ABA by-laws were applied in his case caused him to be on The Spirits' reserve

list and suspended permanently, the petition avers that "Joe Caldwell was permanently suspended by his team." Pet. 3a. The District Court carefully considered this contention, 825 F. Supp. at 566-68, Pet. 32a-37a, and rejected it as having no evidentiary support. *See* 825 F. Supp. at 567-68, Pet. 32a-37a:

> Essentially, Caldwell claims that the manner in which the by-laws were applied in his case, so as to leave him on the Spirits' reserve list permanently, satisfies the concerted action requirement of § 1. . . . [W]e do not believe that Caldwell has come forward with evidence sufficient to convince a reasonable jury that the ABA by-laws were enforced in the manner he suggests. . . .
>
> . . . . [W]e believe that no reasonable jury could conclude that Caldwell was placed "forever" on the Spirits' reserve list . . . .[1]

The District Court found that The Spirits' suspension of Caldwell necessarily ended when Caldwell's employment agreement expired on October 9, 1975, or was otherwise earlier terminated. 825 F. Supp. at 568, Pet. at 36a. Caldwell did not assert and cannot have an antitrust claim based on the ABA by-laws barring another team from hiring him during the period of his exclusive contract with The Spirits. As the District Court noted, if Caldwell had made such a claim, "he would face the formidable task of demonstrating to the satisfaction of a jury that the operation of these by-laws violated § 1 under a Rule of Reason analysis. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986). . . ." 825 F. Supp. at 568-69 n.7; Pet. at 36a n.7.[2]

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[1] Caldwell never contended that the ABA by-laws he references were an unlawful restraint of trade on their face, but only as applied to him in this case.

[2] The Petition erroneously states, "The group boycott has been consistently treated as a *per se* violation of Section 1 of the Sherman Act." Pet. 5. As Judge Sand noted, the law is to the contrary: "[T]he *per se* approach has generally been limited to cases in which firms with market

(Footnote continued)

Second, the Petition repeatedly refers to a "restraint" that the District Court held not to have existed and of which there is no evidence in the record. The record contains no evidence of "the concerted blackballing of the petitioner from employment as a professional player" (Pet. 2), no evidence that "Because of an unlawful conspiracy, he could never again play professional basketball" (Pet. 3), no evidence that there were "wrongs perpetrated by the respondents more than twenty years ago" (Pet. 4), and no evidence of any "concerted decision to blackball Joe Caldwell" (Pet. 5). To the contrary, District Judge Sand held that there was no evidence of any concerted action by the defendants to prevent Caldwell from playing professional basketball. *See* 825 F. Supp. at 572-73, Pet. 45a-46a:

> At trial, Caldwell would ask the jury to construct a conspiracy from the fact that he never obtained employment after the Spirits suspended him — although there are other explanations for the lack of interest demonstrated by other teams — and that the defendants had economic motives to be rid of him — although these so-called "motives" are speculative. . . . Even assuming that the Spirits' suspension of Caldwell was improper; that the Spirits had an economic motive to remove Caldwell from the team; that the ABA would have been advantaged by Caldwell's exit from professional basketball, no inference of *concerted* action is proper based on the evidence submitted by the parties. . . .
>
> Having considered each of Caldwell's claims individually, we state, in the interests of clarity, that his evidence, when considered in the aggregate fares no better in raising a genuine issue of material fact upon which a reasonable jury could infer the

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power boycott suppliers or customers in order to discourage them from doing business with a competitor . . . ." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986).

existence of concerted action by the defendants in violation of § 1.

Third, the petition contains a misstatement concerning the applicability of the collective bargaining agreement to the so-called restraint. While the petition concedes that a collective bargaining agreement between the ABA and its players did exist at the time of the events of which Caldwell complains, it avers that "the collective bargaining agreement did not deal with the subjects of temporary or permanent suspension of players." Pet. 4-5. Indisputably, the collective bargaining agreement between the American Basketball Association Players' Association and the ABA that was in effect when The Spirits suspended Caldwell contained provisions on "Fines and Suspensions" (¶ 25) and provided a "Grievance Procedure" (¶ 14) by which a player could challenge a suspension.[3] Immediately after he was suspended, Caldwell, with the assistance of his union, sought to appeal The Spirits' suspension of him as being in violation of the collective bargaining agreement, but Caldwell later chose to litigate in federal court rather than pursue his labor and other claims under the collective bargaining agreement's procedures. *See* 66 F.3d at 526, Pet. 4a; 825 F. Supp. at 563, Pet. 24a.

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[3] The July 15, 1972 collective bargaining agreement was reproduced in the Supplemental Joint Appendix filed in the Second Circuit. On October 10, 1973, the union and the ABA adopted a new 3-year collective bargaining agreement which incorporated many of the provisions of the 1972 agreement, including the provisions on suspensions and grievances cited in the text. *American Basketball Players' Ass'n*, 215 N.L.R.B. 280 (1974). Affidavits and the N.L.R.B. decision explaining and setting forth these facts were in the Joint Appendix filed in the Second Circuit. The parties' briefs on the appeal below made arguments based on these collective bargaining agreement provisions. The Second Circuit's decision below did not discuss the collective bargaining agreement's provisions governing suspensions and Caldwell's right to grieve.

REASONS FOR DENYING THE WRIT

I. THE QUESTION RAISED IN THE PETITION IS NOT PRESENTED BY THIS RECORD

The question raised in the petition is not presented by the record of this case for three reasons. First, as the District Court held, the record does not support the existence of any "restraint of trade by a professional basketball league" (Pet. i) or by anyone else. The Second Circuit decision did not disturb this holding, and Caldwell does not challenge it here. Nor does petitioner argue here that the District Court applied the wrong legal standard in granting summary judgment because of the absence of a genuine issue as to the existence of any such restraint. *See* 825 F. Supp. at 565-66, Pet. 28a-31a. This constitutes an independent ground for sustaining the judgment below.

Second, the record here does not present the question of whether the nonstatutory labor exemption applies "where the restraint [i.e., The Spirits' suspension of Caldwell] is not the subject of a collective bargaining agreement." Pet. i. When The Spirits suspended Caldwell, and for the period that he remained suspended, there existed a binding collective bargaining agreement between the American Basketball Association Players' Association, the union of which Caldwell was a member, and the ABA, a multiemployer bargaining unit of which The Spirits was a member. The Second Circuit observed below that "the circumstances under which an employer may discharge or refuse to hire an employee" is "a mandatory subject of bargaining pertinent in the instant matter . . . ." 66 F.3d at 529, Pet 11a. It is therefore not surprising that provisions for management disciplining players and for grievance procedures were contained in the collective bargaining agreements between the ABA and the union. *See* p. 6 and note 3 *supra*.

There simply is no question that the nonstatutory labor exemption bars a suspended or dismissed employee from bringing an antitrust action against his employer and its multiemployer bargaining unit where an existing collective bargaining agreement covers the subject of an employee's

suspension and provides grievance procedures to challenge allegedly wrongful suspensions or dismissals. It is equally indisputable that a suspended or dismissed employee may not commence an antitrust action simply by claiming that the collective bargaining agreement did not authorize the particular kind of suspension that his employer meted out in the circumstances and that the conduct of which he complains therefore does not raise a labor issue. Caldwell has presented no argument to the contrary.

Third, Caldwell's own explanation of his suspension constitutes a charge that an unfair labor practice was committed, which precludes an antitrust claim for the same alleged conduct. Caldwell has contended throughout that The Spirits suspended him for engaging in lawful union activities. Caldwell argued to the court below that The Spirits' suspension and the defendants' alleged boycott of Caldwell was motivated by the desire to retaliate for Caldwell's actions as a union leader and to freeze him out of future labor negotiations. App. Br. 13, 16-17;[4] *see* 825 F. Supp. at 569, Pet. 37a-38a.[5] Therefore, the

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[4] "App. Br." refers to Caldwell's brief as appellant in the Second Circuit.

[5] Caldwell was president of the ABA players' union when the Spirits suspended him. In that capacity, Caldwell had refused to sign the collective bargaining agreement that the union's negotiating representative, another union officer, and the ABA representative had agreed to as the culmination of collective bargaining in mid-1973. When The Spirits suspended Caldwell, an unfair labor practice case involving this contract had been pending before the National Labor Relations Board for some time. The next day, the NLRB handed down its decision upholding the validity of the contract and rejecting the arguments supporting Caldwell's refusal to sign it — and specifically rejecting Caldwell's testimony as not credible. *American Basketball Ass'n Players' Ass'n*, 215 N.L.R.B. 280 (1974).

Caldwell likewise argued below that The Spirits' suspension of him was intended to prevent him, as the union's president, from pressing objections to the negotiated settlement of the ABA players union's antitrust class action against the National Basketball Association, which settlement resulted in four surviving ABA teams (*not* including The Spirits, which folded) becoming members of the NBA. *American Basketball Ass'n Players' Ass'n v. National Basketball Ass'n*, 72 F.R.D. 594 (S.D.N.Y. 1976); App. Br. 12-13; *see* 825 F. Supp. at 569, Pet. 37a-38a.

Second Circuit was correct in stating: "This dispute is the familiar case of an employee asserting a discharge based on union activities, a violation of NLRA § 8(a)(3), and an employer claiming that the discharge was for cause. [Citations omitted] Caldwell, however, chose not to pursue his claim under the NLRA." 66 F.3d at 530, Pet. 13a. Accordingly, the anti-union motive Caldwell attributes to defendants could only give rise to an unfair labor practice claim, not the antitrust claim Caldwell has pursued. *See generally Associated General Contractors v. California State Council of Contractors*, 459 U.S. 519, 527, 539-40 (1983).

II. THE QUESTION PRESENTED IN THE PETITION IS NOT IMPORTANT; IT IS NOT RAISED IN ANY OTHER CASE

As shown above, the questions of law that govern the disposition of this case, as distinguished from the question presented in the petition, are well settled. But even if the question presented in the petition were properly presented on the record below, the petition shows no reason why this Court should grant certiorari to decide it.

The petition cites no decision by another circuit, or by this Court, or by any court that raises petitioner's question or any question petitioner could legitimately present on this record. Indeed, the petition cites no other case that even addresses the question upon which the petition seeks review. This indicates that the question framed is not of sufficient or widespread importance to warrant this Court's consideration.

III. THE PETITION SHOULD NOT BE CONSIDERED IN CONJUNCTION WITH OTHER CASES ON THE COURT'S DOCKET

The petition suggests that the present case is related to two other cases on this Court's docket. Pet. 3. The relationship does not warrant holding this petition for consideration in conjunction with either cited case.

The question that the Court will address in *Brown v. Pro Football, Inc.*, 311 U.S. App. D.C. 89, 50 F.3d 1041 (1995),

cert. granted, 64 U.S.L.W. 3414 (U.S. Dec. 8, 1995) (No. 95-388), like the issue in *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed* (U.S. July 24, 1995) (No. 95-137), is distinct from the issue presented in Caldwell's petition. In both *Brown* and *Williams*, the issue raised is whether the expiration of a collective bargaining agreement immediately terminates the applicability to multi-employer conduct of the nonstatutory labor exemption to the antitrust laws and, if not, for how long after the collective bargaining agreement expires the exemption continues. Subsidiary issues in *Brown* include whether a multiemployer agreement to create a category of "developmental squad players" and to fix the salaries of such players is not covered by the labor exemption for the reason that no collective bargaining agreement ever said or implied that the employers could take such action.

In our case, the collective bargaining agreement was in effect at all relevant times. Moreover, the collective bargaining agreement in our case had provisions for the management action at issue, suspension of a player. Therefore, even if this Court decides in *Brown* that the nonstatutory labor exemption terminates on the day that the collective bargaining agreement expires or applies only to management action contemplated by the agreement, the judgment below would still have to be affirmed. Conversely, a decision in *Brown* that the nonstatutory labor exemption applies beyond the expiration of the collective bargaining agreement would not affect the disposition of our case or any others that may be like it.

IV. NO CONFLICT AMONG THE CIRCUITS WARRANTS REVIEW OF THIS CASE

There is no conflict among the circuits on any conceivable issue presented by this case. Accordingly, there is no reason to grant the writ on this account.

CONCLUSION

It is time, finally, to put an end to this 20-year-old breach of contract and labor relations case that has been masquerading as a treble damage antitrust suit. For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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